TAN BOON KEAN

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD AZMI BIN DATO' HJ. KAMARUDDIN FCJ
DATUK WIRA WAN YAHYA BIN PAWAN TEH FCJ
DATO' DR. ZAKARIA B. MOHD YATIM JCA
[CRIMINAL APPEAL NO. 05-64 OF 1993]
9 NOVEMBER 1995

CRIMINAL LAW & PROCEDURE: *End of prosecution case - Nature of case to be proved - Statutory test - Whether prosecution to prove only a prima facie case - Prima facie case - Meaning of - Whether to be established by beyond reasonable doubt evidence - Criminal Procedure Code ss.. 173 (f), 180, 214(1).*

CRIMINAL LAW & PROCEDURE: *End of prosecution case - Consideration of Khoo Hi Chiang v. Public Prosecutor - Maximum evaluation approach - Whether referring to maximum evaluation of the evidence for the establishment of a prima facie case - Whether only requiring that evidence on ingredients of charge to be free from reasonable doubt - Ratio decidendi therein - Whether definitive ruling pronounced which replaced the "prima facie case" test imposed by s. 180 Criminal Procedure Code.*

DANGEROUS DRUGS: *Charge under s. 39B(1)(a) Dangerous Drugs Act 1952 - Consideration of s. 37(da) of Act - Whether trial Judge dutybound to direct his mind as to the reason why the accused had failed to rebut the presumption of trafficking - Failure to sufficiently consider s. 37(da) - Effect.*

INTERPRETATION: *Section 180 Criminal Procedure Code - Whether "case" therein meant a prima facie case.*

WORDS & PHRASES: *"Prima facie" - "Which if unrebutted would warrant his conviction" - "Case for the prosecution" - "No case against the accused".*

This was an appeal by the appellant against his conviction and sentence in respect of an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1980), for which he was sentenced to death. The facts showed that at the trial below, at the close of the case for the prosecution, the trial Judge was satisfied that there was sufficient evidence adduced by the prosecution for calling the defence, and that being the case, "following the principles in *Haw Tua Tau v. Public Prosecutor* [1981] 2 MLJ 49 and *Ragunathan v. Public Prosecutor* [1982] 1 MLJ 139", called for defence to be entered. In this appeal the appellant argued that the trial Judge was wrong in law, not only in relying on *Haw Tua Tau* and *Ragunathan*, which he said had been overruled by *Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151, [1994] 1 MLJ 265, but also in not undertaking a maximum evaluation of the evidence, at the close of the prosecution case, to determine whether or not the prosecution had established the charge beyond reasonable doubt, as envisaged by the Supreme Court in *Khoo Hi Chiang.* Before the Federal Court the primary issues that arose were:

1. Whether the trial Judge, in relying on *Haw Tua Tau* and *Ragunathan*, had misdirected himself in law.

2. Whether the trial Judge had erred in law in that he had failed to apply the *ratio decidendi* in *Khoo Hi Chiang* when deciding to call for the appellant's defence.

3. Whether in calling for the defence the way he did, the trial Judge had wrongly applied the statutory test as imposed by s. 180 Criminal Procedure Code (CPC).

Held:

Per Mohd Azmi bin Kamaruddin FCJ (delivering the judgment of the Court):

[1] The words "if unrebutted" and "would" in s. 180 CPC have consistently been interpreted by the Courts as imposing on the prosecution to establish a "*prima facie* case", before the Court is lawfully entitled to call for the accused to enter on his defence. On the authorities, there can be no ambiguity that the nature of the "case" required to be proved under s. 180 is a "*prima facie* case", i.e, a case "which if unrebutted would warrant his conviction", and not "a beyond reasonable doubt case".

[2] In an adversarial system of criminal justice such as ours, the final decision on whether the accused is beyond reasonable doubt guilty of the offence with which he is charged must remain an open question until the end of the trial. This apart, to require a "beyond reasonable doubt case" to be proved even at the close of the case for the prosecution, would render the words "if unrebutted" and "would warrant his conviction" in s. 180 meaningless and redundant. It would also be intolerable for the Court to find the accused guilty beyond reasonable doubt twice, once at the close of the prosecution case, and again at the conclusion of the trial, before there can be a conviction.

[3] The nature of the "case" to be proved is to be distinguished from the nature of the evidence. What this means is that before a *prima facie* case can be said to be established, there must be beyond reasonable doubt evidence to establish every legal ingredient of the charge against the accused. It follows that at the close of the case for the prosecution, two questions need be addressed, namely, the question of evidence with regard to the requirement of "maximum evaluation" and the question of law with regard to the requirement of making out a case against the accused under s. 180 CPC.

[4] In *Khoo Hi Chiang* the Supreme Court was dealing with the establishment of the "charge" by the maximum evaluation evidence, and not the establishment of the "case" under s. 180. The interpretation of the word "case" referred to in s. 180 only appears in *Khoo Hi Chiang* as an *obiter dicta*, as it was only touched upon whilst the Court was dealing with the principal issue of maximum evaluation of the evidence. There is no definitive ruling in *Khoo Hi Chiang* that the word "case" in s. 180 is not a *prima facie* case.

[5] It seems clear that apart from the question of the evaluation of the evidence for the purpose of s. 180, *Khoo Hi Chiang* has not made any other binding pronouncement which can be said to have replaced the "*prima facie* case" test imposed by s. 180. In the circumstances the only ratio in that case is on the requirement of maximum evaluation of the evidence at the close of the case for the prosecution. The Court below, therefore, is only bound by this ratio, which means that the Court must consider the whole evidence of the prosecution as tested in the cross-examination, on the essential ingredients of the charge.

[6] The learned Judicial Commissioner had correctly applied the *prima facie* test when he held that he believed the evidence of the prosecution witnesses, and that there was sufficient evidence for him to call for the defence. On the evidence before him there was clearly a *prima facie* case to answer. There is also no doubt that he had carried out the

maximum evaluation of the evidence when he concluded that he believed the testimony of the witnesses called by the prosecution. The learned Judicial Commissioner therefore did not err in law when he called the appellant to enter his defence.

[7] On the facts the learned Judicial Commissioner was justified to conclude from the evidence that the appellant was indeed in possession of the heroin, but had fallen short of considering whether, on the balance of probabilities, the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act had been rebutted. Having regard to the principle laid down in *Mohamed Radhi bin Yaacob v Public Prosecutor* [1991] 3 MLJ 169, the Judicial Commissioner had clearly erred in law in not sufficiently directing his mind as to the reason why, in the face of the undisputed evidence, the accused had failed to rebut the presumption of trafficking.

[8] Upon the evidence the appellant's conviction must be reduced from trafficking to one of possession under s. 12 and 39A Dangerous Drugs Act. The death sentence passed by the Court below is therefore set aside, and substituted with a sentence of 14 years imprisonment and six strokes of whipping.

[Appeal allowed. Order accordingly].

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG & PROSEDUR JENAYAH: *Akhir kes pendakwaan - Sifat kes yang perlu dibuktikan - Ujian Berkanun - Samada pendakwaan hanya perlu membuktikan kes prima facie - Kes prima facie - Maksud - Samada hendaklah dibuktikan melalui keterangan yang melewati keraguan yang munasabah - Kanun Prosedur Jenayah ss. 173(f), 180, 214(l).*

UNDANG-UNDANG & PROSEDUR JENAYAH: *Akhir kes pendakwaan - Pertimbangan Khoo Hi Chiang lwn. Pendakwa Raya - Pendekatan penilaian maksima - Samada merujuk kepada penilaian maksima keterangan bagi menentukan kes prima facie - Samada hanya menghendaki supaya keterangan mengenai unsur-unsur tuduhan hendaklah bebas daripada keraguan munasabah - Ratio decidendi di dalamnya - Samada keputusan pasti dibuat bagi menggantikan ujian "kes prima facie" yang dikenakan oleh s. 180 Kanun Prosedur Jenayah.*

DADAH BERBAHAYA: *Tuduhan di bawah s. 39B(l)(a) Akta Dadah Berbahaya 1952 - Pertimbangan s. 37(da) Akta tersebut - Samada Hakim perbicaraan terikat oleh kewajipan untuk mengarahkan pemikirannya kepada alasan mengapa tertuduh gagal untuk menyangkal anggapan pengedaran - Kegagalan untuk menimbangkan dengan wajarnya s. 37(da) - Kesan.*

PENTAFSIRAN: *Seksyen 180 Kanun Prosedur Jenayah - Samada "kes" di dalamnya bermaksud suatu kes prima facie.*

PERKATAAN & ISTILAH: *"Prima facie" - "yang mana jika tidak disangkal akan mewajarkan sabitan" - "kes untuk pihak pendakwaan" - "Tiada kes terhadap tertuduh".*

Ini adalah satu rayuan oleh perayu terhadap sabitan serta hukuman berhubung dengan kesalahan di bawah s. 39B(l)(a) Akta Dadah Berbahaya 1952 (Semakan 1980), di mana beliau telah dijatuhkan hukuman mati. Fakta menunjukkan bahawa, pada penutupan kes bagi pihak pendakwaan, Hakim perbicaraan berpuas-hati bahawa terdapat keterangan yang memadai yang dikemukakan oleh pihak pendakwaan bagi memanggil pembelaan, dan oleh hal yang sedemikian, "mengikuti prinsip-prinsip dalam *Haw Tua Tau v. Public Prosecutor* [1981] 2 MLJ 49 dan *Ragunathan v. Public Prosecutor* [1982] 1 MLJ 139", telah meminta

supaya pembelaan dibuat. Dalam rayuan ini perayu telah berhujah bahawa Hakim perbicaraan salah di sisi undang-undang, bukan sahaja kerana bergantung kepada *Haw Tua Tau* dan *Ragunathan*, yang mana, menurut perayu, telah ditolak oleh *Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151, [1994] 1 MLJ 265, tetapi juga kerana tidak menjalankan penilaian maksima terhadap keterangan, di akhir kes pendakwaan, bagi menentukan samada pihak pendakwaan telah membuktikan atau pun tidak tuduhan tersebut tanpa keraguan yang munasabah, sepertimana yang dibayangkan oleh Mahkamah Agung dalam *Khoo Hi Chiang*. Di hadapan Mahkamah Persekutuan isu utama yang berbangkit adalah:

1. Samada Hakim perbicaraan, dalam bergantung pada *Haw Tua Tau* dan *Ragunathan* telah tersalah arah di sisi undang-undang.

2. Samada Hakim perbicaraan telah tersalah pertimbangan di sisi undang-undang, iaitu beliau telah gagal memakai *ratio decidendi* dalam *Khoo Hi Chiang* bilamana membuat keputusan untuk memanggil pembelaan perayu.

3. Samada apabila memanggil pembelaan perayu sebagaimana yang telah dilakukannya, Hakim perbicaraan telah tersalah pakai ujian berkanun sepertimana yang dikenakan oleh s. 180 Kanun Prosedur Jenayah (KPJ).

Diputuskan:

Oleh Mohd Azmi bin Kamaruddin, HMP (menyampaikan penghakiman Mahkamah):

[1] Perkataan-perkataan "jika tidak disangkal" dan "akan" dalam s. 180 KPJ secara konsistennya telah ditafsirkan oleh Mahkamah sebagai meletakkan keatas pihak pendakwaan untuk membuktikan satu "*kes prima facie*", sebelum Mahkamah berhak di sisi undang-undang memanggil tertuduh untuk memasukkan pembelaannya. Berdasarkan autoriti-autoriti, tidak syak lagi bahawa sifat "kes" yang perlu dibuktikan di bawah s. 180 adalah "kes *prima facie*", iaitu suatu kes "yang jika tidak disangkal akan mewajarkan sabitan", dan bukan "suatu kes diluar keraguan yang munasabah".

[2] Dalam sistem keadilan jenayah adversarial seperti yang diamalkan disini, keputusan muktamad samada tertuduh bersalah di luar keraguan yang munasabah atas tuduhan yang dihadapinya, mestilah kekal menjadi persoalan yang terbuka sehingga ke penghujung perbicaraan. Di samping itu, menghendaki supaya "kes di luar keraguan yang munasabah" dibuktikan di akhir kes pendakwaan, akan menjadikan perkataan-perkataan "jika tidak disangkal" dan "akan mewajarkan sabitannya" dalam s. 180 tidak bermakna dan tidak diperlukan. Ianya juga tidak dapat diterima bahawa sebelum terdapatnya suatu sabitan Mahkamah harus mendapati tertuduh bersalah di luar keraguan yang munasabah sebanyak dua kali, satu di penutupan kes pendakwaan dan sekali lagi pada penamatan perbicaraan.

[3] Sifat "kes" yang perlu dibuktikan adalah berbeza dari sifat keterangan. Ini membawa maksud bahawa sebelum sesuatu kes *prima facie* dapat dianggap sebagai telah dibuktikan, haruslah wujud keterangan di luar keraguan yang munasabah yang membuktikan setiap unsur tuduhan terhadap tertuduh. Ianya dengan itu mengikut bahawa pada penutupan kes pendakwaan dua persoalan haruslah diberi perhatian, iaitu, persoalan keterangan berhubung dengan kehendak "penilaian maksima" dan persoalan undang-undang berhubung dengan kehendak membentuk satu kes terhadap tertuduh di bawah s. 180 KPJ.

[4] Mahkamah Agung dalam *Khoo Hi Chiang* memperkatakan tentang pembuktian "tuduhan' melalui keterangan penilaian maksima, dan bukannya pembuktian "kes" di bawah s. 180. Pentafsiran perkataan "kes" yang dirujuk dalam s. 180 hanya terdapat dalam *Khoo Hi Chiang* sebagai *obiter dicta*, kerana ianya hanya disentuh ketika Mahkamah

memperkatakan tentang isu utama penilaian maksima keterangan. Tidak terdapat keputusan muktamad dalam *Khoo Hi Chiang* bahawa perkataan "kes" dalam s. 180 bukannya merupakan kes *prima facie*.

[5] Adalah jelas bahawa selain daripada persoalan penilaian keterangan bagi tujuan s. 180, *Khoo Hi Chiang* telah tidak membuat apa-apa pernyataan mengikat yang boleh dikatakan sebagai telah menggantikan ujian "*kes prima facie*" yang dikenakan oleh s. 180. Dengan yang demikian satu-satunya ratio yang diputuskan dalam kes itu hanyalah berhubung keperluan membuat penilaian maksima ke atas keterangan di akhir kes pendakwaan. Mahkamah di bawah, dengan itu, hanya terikat dengan ratio tunggal ini, yang bermakna bahawa Mahkamah haruslah menimbang keseluruhan keterangan pendakwaan, sepertimana yang telah diuji dalam pemeriksaan-balas, mengenai unsur-unsur penting tuduhan.

[6] Pesuruhjaya Kehakiman yang bijaksana telah memakai ujian *prima facie* dengan betulnya bilamana beliau memutuskan bahawa beliau mempercayai keterangan saksi-saksi pihak pendakwaan dan bahawa terdapatnya keterangan yang memadai baginya untuk memanggil pembelaan. Berdasarkan keterangan di hadapannya, jelas terdapat satu kes *prima facie* untuk dijawab. Juga tidak terdapat apa-apa keraguan bahawa beliau telah menjalankan penilaian maksima terhadap keterangan tersebut bilamana beliau memutuskan bahawa beliau mempercayai testimoni saksi-saksi yang dipanggil oleh pihak pendakwaan. Pesuruhjaya Kehakiman dengan itu tidak tersalah pertimbangan di sisi undang-undang apabila memanggil perayu untuk memasukkan pembelaannya.

[7] Berdasarkan fakta adalah wajar bagi Pesuruhjaya Kehakiman memutuskan daripada keterangan bahawa perayu sememangnya menpunyai milikan heroin tersebut, tetapi beliau gagal menimbangkan samada, atas imbangan kebarangkalian, tanggapan mengedar di bawah s. 37(da) Akta Dadah Berbahaya telah disangkal. Menimbangkan prinsip yang dibentang oleh *Mohamed Radhi bin Yaacob v. Public Prosecutor* [1991] 3 MLJ 169, Pesuruhjaya Kehakiman telah tersalah pertimbangan di sisi undang-undang kerana tidak mengarahkan pemikirannya dengan secukupnya berhubung dengan alasan mengapa, dalam keadaan keterangan yang tidak dipertikaikan, tertuduh telah gagal untuk menyangkal tanggapan mengedar.

[8] Berdasarkan keterangan yang ada sabitan perayu haruslah dikurangkan daripada mengedar kepada pemilikan di bawah s. 12 dan 39A Akta Dadah Berbahaya. Hukuman mati yang dijatuhkan oleh Mahkamah di bawah adalah dengan itu diketepikan, dan digantikan dengan hukuman penjara selama 14 tahun dan disebat sebanyak 6 kali.

[Rayuan dibenarkan. Perintah sekadarnya].

Cases referred to:
Haw Tua Tau v. PP [1981] 2 MLJ 49 ***(refd)***
Ragunathan v. PP [1982] 1 MLJ 139 ***(refd)***
Khoo Hi Chiang v. Public Prosecutor [1994] 1 MLJ 265 ***(foll)***
Public Prosecutor v. Chin Yoke [1940] MLJ 47 ***(foll)***
Miller v. Minister of Pensions [1947] 2 KBD 372 ***(refd)***
Kumaraguru & Ors. v. Public Prosecutor [1994] 1 MLJ 254 ***(refd)***
May v. O'Sullivan [1955] 92 CLR 654 ***(foll)***
Mohamed Yatim bin Abu Bakar v. Public Prosecutor [1950] MLJ 57 ***(refd)***
Mohamed Radhi bin Yaakob v. Public Prosecutor [1991] 3 MLJ 171 ***(foll)***
Ng Theng Shuang v. Public Prosecutor [1995] 2 SLR 36 ***(refd)***
Magor & St. Mellons RDC v. Newport Corporation [1952] AC 189 ***(refd)***
Public Prosecutor v. Lee Pak [1937] MLJ Rep. 251 ***(refd)***

Public Prosecutor v. Lee Yee Heng [1938] MLJ Rep. 113 ***(refd)***
Munusamy v. Public Prosecutor [1987] 1 MLJ 492 ***(refd)***
Public Prosecutor v. Lim Teong Seng & 2 Others [1946] 12 MLJ 108 ***(refd)***
Public Prosecutor v. R. Balasubramaniam [1948] 14 MLJ 119 ***(refd)***
Gan Soo Swee & Anor. v. Ramoo [1969] 1 MLJ 59 ***(cit)***
Wong Yiap Long & Another v. Public Prosecutor [1955] 21 MLJ 132 ***(refd)***
Public Prosecutor v. Saimin & Others [1971] 2 MLJ 16 ***(refd)***
Mah Kok Cheong v. R. [1953] 19 MLJ 46 ***(aff)***
Public Prosecutor v. Goo Kian [1939] MLJ 291 ***(aff)***

Legislation referred to:
Criminal Procedure Code, ss. 173(f), 180, 214(1)
Dangerous Drugs Act 1952, ss. 39B, 37(b), (d), (g)
Penal Code, s. 477

Other sources referred to:
Mozley and Whiteley's Law Dictionary, 5th Edn
Sarkar on Evidence, p. 45
The Oxford Companion to Law, p. 987
Cross on Evidence 2nd Edition, pp. 24 & 25

For the appellant - Karpal Singh; (Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.
For the public prosecutor - Stanley Clement Augustin, DPP

JUDGMENT

Mohd Azmi bin Kamaruddin FCJ:

The appellant was called to enter his defence on a charge of trafficking in 25.84 grammes of heroin, an offence under s. 39B Dangerous Drugs Act 1952, and at the end of the trial he was found guilty and sentenced to death on the following amended charge:

> Bahawa kamu pada 21 Oktober 1985 jam lebih kurang 9.45 malam di sebuah bilik di dalam sebuah rumah No. 4, Jalan Siam, Georgetown dalam daerah Georgetown dalam Negeri Pulau Pinang telah mengedar dadah merbahaya iaitu 25.84 gram heroin dan oleh itu kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

He has appealed to this Court against his conviction and the death sentence, and advanced fourteen grounds in his petition of appeal against the decision of the learned Judicial Commissioner, Y. A. Tuan Yaacob bin Haji Ismail, given in the High Court at Penang on 7 August 1993. The prosecution evidence in the Court below disclosed that on the date in question, a party of five police personnel led by Inspector Arumugam (PW5) raided a house at no, 4. Jalan Siam, Penang at about 9.45 p.m. on 21 October 1985. During the house search, the appellant was seen opening the door of a room from inside and quickly withdrew and closed the door the moment Inspector Arumugam identified himself as a police officer. With the help of Detective Sergeant Basiron (PW6), the Inspector managed to push his way in and found the appellant alone in a small room. There was no bed in the room, but on the floor there was a pillow. During the ensuing search of the room, the Inspector recovered under the pillow two packages wrapped in chinese newspapers containing a total of thirteen packets of substance which was later analysed by Mr. Ng Hock Sing, the Government chemist (PW1) and found to be heroin as defined in the Dangerous Drugs Act 1952. On recovery of the two packages, the appellant was arrested. Apart from the heroin, the police raiding party also seized from the room a forged NRIC with the name of one Lim Beng Cheng but bearing appellant's photograph, together with other exhibits relating to counterfeiting activities.

The prosecution adduced evidence which disclosed that at the material time the small room was rented by one Chew Kok Seah (PW16) to the appellant. He was staying there alone and had the key to the room, and was acting in such manner during the police raid as to show that he was in possession of the dangerous drugs when considered together with the presumption of knowledge under s. 37(g) of the Act. He had the care and management of the room to invoke the presumption under s. 37(b) that he should be deemed to be the occupier of the room, and therefore under s. 37(g) should be presumed to have knowledge of the drugs concealed under the pillow. Alternatively, as the room was quite small, and since he was staying there by himself, he was clearly at the material time in custody or control of the packages which contained the heroin, so that he should be deemed to be in possession of the dangerous drugs by virtue of s. 37(d). The weight of the heroin being more than 15 grammes would also attract the presumption of trafficking under s. 37(d) of the Act.

In calling for the appellant to enter for his defence, the learned Judicial Commissioner gave the following reasons in his grounds of judgment:

> At the close of the case for the prosecution the Court held there was sufficient evidence adduced by the prosecution for the defence to be called.
>
> The accused was found in the room alone and the drugs were found under a pillow inside the room. There were no other persons in the room. Also the accused was the sole tenant and occupier of the room. This fact was stated by SP16, the chief tenant of house No, 4, Jalan Siam, Penang.
>
> Through the evidence of the chemist (SP1), it was proved that the drugs found, that is P2 & P3 were heroin as defined under the Dangerous Drugs Act. **The evidence given by witnesses for the prosecution was credible. Following the principles in *Haw Tua Tau v. PP* [1981] 2 MLJ 49 and *Ragunathan v. PP* [1982] 1 MLJ 139 I called for the defence.**

(Emphasis supplied)

The lengthy judgment of the Privy Council in *Haw Tua Tau* lays down a number of legal principles. The learned Judicial Commissioner did not specify which particular principle or principles he was referring to, but Mr. Karpal Singh, Counsel for the appellant argues that the above reasoning of the learned Judicial Commissioner is wrong in law for the reasons given in the first and second grounds in his Petition of Appeals:

> 1. The learned trial Judge was wrong in law in concluding, 'Following the principles in *Haw Tua Tau v. PP* [1981] 2 MLJ 49 and *Ragunathan v. PP* [1982] 1 MLJ 139, I called for the defence';
>
> 2. The learned trial Judge was wrong in law in not concluding it was the duty of the prosecution at the close of its case to undertake a maximum evaluation of the evidence led by the prosecution to determine whether or not the prosecution had established the charge against the appellant beyond all reasonable doubt;

Mr. Karpal Singh's major complaint is therefore against the alleged failure of the learned Judicial Commissioner to direct his mind to the need to undertake a maximum evaluation of the evidence and to the object of such exercise before calling for the appellant to enter his defence as envisaged by the Supreme Court in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265. To determine this appeal, we are obliged to consider whether the learned Judicial Commissioner has erred in law in not applying s. 180 of the Criminal

Procedure Code and the *ratio decidendi* in *Khoo Hi Chiang* when deciding to call for the appellant's defence, so as to render his conviction unsustainable in law. In the difficult task of interpreting s. 180, we are of course strictly guided by the principle of *stare decisis.*

In the alternative Mr. Karpal Singh urges this Court to reduce the conviction from trafficking to one of possession, having regard to the evidence before the Court. We must stress at this stage that if the statutory test imposed by s. 180 Criminal Procedure Code had been wrongly applied by the learned Judicial Commissioner in calling for the appellant to enter his defence, then the conviction would certainly be wrong in law irrespective of whether the conviction is for trafficking or for mere possession of dangerous drugs under the 1952 Act.

As both parties needed time to consider the *ratio decidendi* in *Khoo Hi Chiang*, this appeal which was partly heard in Penang was adjourned to Kuala Lumpur. Both parties were given time to put in their further written submissions, particularly on the legal effect (if any) of *Khoo Hi Chiang* on the interpretation of s. 180 in respect of criminal trials by a single Judge, and in particular whether the object and purpose of the maximum evaluation principle enunciated in *Khoo Hi Chiang* is for the establishment by the prosecution of a *prima facie* case or a beyond reasonable doubt case.

Section 180 of Criminal Procedure Code provides:

> When **the case** for the prosecution is concluded the Court, if it finds that **no case** against the accused has been made out **which if unrebutted would warrant his conviction**, shall record an order of acquittal, or, if it does not so find shall call on the accused to enter on his defence.

(emphasis supplied)

There is no dispute that this section is essentially the same as s. 173(f) Criminal Procedure Code relating to trials before a Magistrate, but somewhat different from the provision of s. 214(1) in respect of jury trial which has recently been abolished:

> When **the case** for the prosecution is concluded, the Court, if it considers **that there is no evidence that the accused committed the offence**, shall direct the jury to return a verdict of not guilty.

(emphasis supplied)

It is clear from the words used by the legislature that s. 214(1) deals with evidence and a situation where there is no evidence before the jury that the accused committed the offence; and whereas s. 180 deals with "case for the prosecution" and "no case against the accused".

It is therefore necessary to consider what is the nature of the "case" required to be established by the prosecution as distinguished from the nature of the evidence, before a decision is made to call for the defence.

In his submission on maximum evaluation principle in relation to *prima facie* evidence and *prima facie* case required to be established under s. 180, Mr. Karpal Singh refers to us the case of *Public Prosecutor v. Chin Yoke* [1940] MLJ 47 Rep. at 48, which made the following important pronouncement:

> This follows very closely the actual wording of the sections referred to but it does not follow, in my opinion, that the Magistrate or Judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so

doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case the accused is then called upon to answer the *prima facie* case which has thus been made out against him. If however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence.

Mr. Karpal Singh requests this Court to note the importance of the phrase "which if unrebutted would warrant his conviction" in both ss. 180 and 173(f), "Maximum evaluation" cannot mean requiring 100% proof, i.e. absolute certainty. He refers to the principle enunciated in *Miller v. Minister of Pensions* [1947] 2 KBD 372 at 373 which he says should be adopted, *viz.*:

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

The learned Counsel then referred to us the case of *Kumaraguru & Ors. v. Public Prosecutor* [1994] 1 MLJ 254 at 264, in which Vincent Ng JC held:

Logically, the rationale employed in deciding to call the accused to enter upon his defence, which is based on asking certain hypothetical questions, could not be the same rationale for the conviction of the accused, in our system of justice which permits one and only one standard of proof for conviction and that is that each and every essential element of the offence has to be proved beyond reasonable doubt.

Even then, it is this Court's view that the expression 'if unrebutted' would seem to confine the application of the lower '*prima facie*' test at the close of the prosecution's case, to only the rebuttable (essential) elements of the charge. Whereas, in respect of certain essential elements of the charge which are not of the rebuttable type, eg. the identity of the offending exhibits, the prosecution would have to establish such irrebuttable elements upon a higher beyond reasonable doubt test in order for the defence to be called.

On the interpretation of s. 180 Criminal Procedure Code, Mr. Karpal Singh also refers to us the following judgment of the High Court of Australia in *May v. O'Sullivan* [1955] 92 CLR 654 at 658 which in our view is of considerable assistance, although that country has only common law but no similar statutory provision for acquittal at the close of the prosecution where there is no case to answer:

When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", **the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted**. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate, as is pointed out in *Wilson v. Buttery* [1926] SASR 150 for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear; cf. *Morgan v. Babcock &*

> *Wilcox*, per Issacs J [1926] SASR at pp. 153, 154. But to say this is a very different thing from saying that the onus of proof shifts. A Magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made a '*prime facie* case', but it does not follow that in the absence of a 'satisfactory answers' the defendant should be convicted.

(Emphasis supplied)

On standard of proof, we are referred to *Mohamed Yatim bin Abu Bakar v. Public Prosecutor* [1950] MLJ 57 which Mr. Karpal Singh says ought to be read in the light of the principle enunciated in *Mohamed Radhi bin Yaakob v. Public Prosecutor* [1991] 3 MLJ at 171:

> In this country, at the close of the case for the prosecution the Court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed.

From the written submissions of Mr. Karpal Singh, it is clear that we have to deal with two separate and distinct issues; first, on the question of evidence with regard to the requirement of "maximum evaluation" - the phrase used and enunciated in *Khoo Hi Chiang*; and second, on the question of law with regard to the requirement of making out a case against the accused under s. 180. The first is essentially an issue on evidence, and the second, is an issue of law on statutory burden placed on the prosecution before the defence of the accused could be called, as distinguished from the general burden of proof beyond reasonable doubt on the guilt of the accused.

In his written reply, Mr. Stanley Augustin, the Deputy Public Prosecutor is in total agreement with Mr. Karpal Singh's submission that maximum evaluation as enunciated in *Khoo Hi Chiang* cannot mean requirement of 100 percent proof, i.e, absolute certainty at the close of the case for the prosecution. He emphasised that:

> .... nowhere in the judgment has Y.A. Edgar Joseph Jr. equated maximum evaluation as requiring 100% proof, i.e., absolute certainty.

The learned Deputy Public Prosecutor appears to understand the distinction between an accused "could be found guilty" and one that "ought to be found guilty" when he states:

> Maximum evaluation must mean that the Court has to give maximum consideration to the prosecution evidence to decide whether the evidence adduced thus far **is sufficient upon which the accused can be found guilty** if the evidence of the prosecution has not been rebutted by the defence.

(Emphasis supplied)

The learned Deputy would seem to support the proposition that the object of the maximum evaluation of the evidence at the close of case for the prosecution is to decide whether the accused "could" and not "ought" to be found guilty - a proposition approved in *May v. O'Sulllivan.*

However, in his final written submission, the learned Deputy Public Prosecutor makes the following startling submission on the interpretation of s. 180, particularly on the proposition without authority that a higher standard of proof is placed on the prosecution in trials of cases without jury (e.g, theft) as compared to trials with a jury (e.g. murder):

> It is respectfully submitted that the words "if unrebutted" in s. 180 of the Criminal Procedure Code are governed by the words "would warrant a conviction". It gives meaning to what the consequence would be if the evidence of prosecution is not rebutted. The

Singapore Court of Appeal in the case of *Ng Theng Shuang v. PP* [1995] 2 SLR 36 passed over the words 'would warrant a conviction'.

In the case of *Haw Tua Tau v. PP* [1981] 2 MLJ 49 the Privy Council referred in extenso to a jury trial but such reference by the Privy Council was not appropriate as it was not a trial by jury (see page 49 paras C-D right hand column). Y.A. and Y.A. are respectfully invited to contrast the wordings in s. 180, trial by a Judge sitting alone and the previous s. 214 (iii) in respect of trial by Judge and Jury. For ease of reference both sections are reproduced hereunder:

> Section 180: When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.'
>
> Section 214(iii): The jury may return a verdict of not guilty either unanimously or by a majority at any time after the conclusion of the evidence for the prosecution if they consider the case to be one in which they could not safely convict.

The difference here is that in a trial by jury the jury can acquit at the end of prosecution case if the jury cannot safely convict on the evidence adduced which is the '*Haw Tua Tau'* test. Evidence which is inherently incredible is to be treated on the same footing where there is insufficient evidence to find the person on arrangement guilty.

In a non-jury trial the Court can acquit "if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction". The standard of proof in a non-jury trial on the prosecution it seems for all intents and purposes is a higher one than that for a trial by a jury before the abolition of trial by jury. From the foregoing it is respectfully submitted that the Legislature must have intended that a higher standard of proof is placed on the prosecution in trials of criminal cases without jury as compared with that to trial with a jury.

It is respectfully submitted that the case of *Ng Theng Shuang v. PP* is not applicable to cases in our Courts.

There is obviously a distinction between s. 180 and s. 214, but what is relevant here is to consider the nature or type of "case" referred to in s. 180 "which if unrebutted would warrant his conviction." The words "if unrebutted" are particularly critical in conjunction with the word "would" for the purpose of determining the nature of the case to be made out by the prosecution at that stage of the trial. Successive judicial pronouncements including the case cited by Mr. Karpal Singh (*Public Prosecutor v. Chin Yoke; Kumaraguru & Ors. v. Public Prosecutor* etc.) consistently have ruled that the "case" is a *prima facie* case. Neither Mr. Karpal Singh nor Mr. Stanley Augustin has shown us any authority that the *prima facie* test in s. 180 has been abandoned by any definitive or fully considered ruling. Indeed, the case of *Ng Theng Shuang v. Public Prosecutor* [1995] 2 SLR 36 clearly suggests that notwithstanding the amendments to the Singapore Criminal Procedure Code, the words "if rebutted would warrant his conviction" could only connote a *prima facie* case and not a beyond reasonable doubt case.

We had to stress once again that since the two provisions - s. 180 and s. 173(f) of Criminal Procedure Code are essentially the same, we need only refer to s. 180, which is the provision we are directly concerned with. For purpose of dispelling any doubt, we need to stress also that we are bound by the *ratio* in *Khoo Hi Chiang* that the duty of the Court, at the close of case for the prosecution, is to undertake a maximum evaluation of the evidence. What remains to be determined after *Khoo Hi Chiang* is whether the object of the maximum evaluation exercise is for the prosecution to establish a beyond reasonable doubt case or a *prima facie* case under s. 180.

On interpretation of statutes, the duty of the Court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. (see *Magor & St. Mellons RDC v. Newport Corporation* [1952] AC 189 at 191). The Court has no power to change any words used by the legislature. Further, where the words are simple and clear, it is the duty of the Court of law to give these words their natural meaning even though such interpretation leads to apparent anomalies. On the available authorities which we are able to discover, in addition to the cases cited by both Counsels, there can be no ambiguity that the "case" required to be established by the prosecution under s. 180 is a "*prima facie* case" and not a "beyond reasonable doubt case". Thus, in *Public Prosecutor v. Lee Pak* [1937] MLJ Rep, 251 at 254, the Magistrate acquitted the accused on a charge under s. 45 (iv) of the Motor Vehicles Enactment (Cap. 168) without being called upon to make his defence. In allowing the appeal of the Public Prosecutor, Whitley, Ag. CJ, after reviewing the evidence held:

> I was accordingly of the opinion that the prosecution had made out a *prima facie* case, that the defence should have been called upon, and that the case must go back for retrial. As this was the third case which came before me on the same day in which the Public Prosecutor successfully appealed against an acquittal on the ground that the Magistrate ought to have called upon the defence, and did not, I think it desirable to draw attention to s. 173(f) of the Criminal Procedure Code which provides that:
>
> > If upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.
>
> In each of these three appeals it was clear from the record that a case had been made out, which if unrebutted would have warranted a conviction. It is not necessary or desirable that I should indicate whether in my opinion the cases were strong or weak ones, but each of them certainly called for an answer.
>
> In Selangor Criminal Appeal No. 55 of 1937...
>
> In Selangor Criminal Appeal No. 68 of 1937 the accused was charged with failing to keep his premises in such a state as not to be a nuisance contrary to Sanitary Board By-law 33 (a) Part III, an offence punishable under s. 17(ii) of the Sanitary Boards Enactment (Cap. 137). Under that By-law the person liable is the occupier of the premises. Occupier is defined in the Enactment as meaning *inter alia* the person having the charge, management or control of the premises. The evidence showed that the accused was the principal tenant of the house. He told the Inspector that he sub-let the first floor on the passage-way of which the rubbish had accumulated, but there was no evidence that that was so. The Magistrate held that it followed from this statement by the accused that he was not the occupier of the first floor, and acquitted him without calling upon him for his defence. In so holding the Magistrate misdirected himself. The prosecution having proved that the accused was the tenant of the whole house, *prima facie* he was the occupier and had control. It was for him to show that in some way or other he had no control or had parted with control. He could not show this without giving evidence and he should have been called upon. Rather than he put to the trouble of a retrial he asked me to take further evidence and dispose of the case myself. I did so and it became clear that he had only sublet the rooms on the first floor and retained control over the passage which was the only means of access for persons approaching the second floor. I accordingly convicted him of a technical offence. Magistrates should bear in mind that in order to entitle them to call upon the defence it is not necessary that the prosecution should have made out an unanswerable case, It is sufficient if they have made out a *prima facie* case which calls for an answer, and which it is necessary for the accused to rebut.

The words "if unrebutted" and "would" in s. 180 of Criminal Procedure Code have consistently been interpreted by our Courts as imposing on the prosecution to establish a "prime facie case", before the Court is lawfully entitled to call for the accused to enter on his defence. If the prosecution fails to establish a *prima facie* case based on thorough evaluation of the prosecution evidence as tested in cross-examination, then the accused is entitled to an acquittal at that stage of the trial. In an adversarial system of justice such as ours, the final decision on whether the accused is beyond reasonable doubt guilty of the offence with which he is charged, must remain an open question until the end of the trial. But by virtue of s. 180, the accused is entitled to an acquittal at close of prosecution case in the absence of a *prima facie* case being established.

Lee Pak's case was followed in *Public Prosecutor v. Lee Yee Heng* [1938] MLJ Rep. 113 which involved a charge for the abetment of chandu under the Opium and Chandu Enactment (Cap, 134). Counsel for the accused submitted at the close of case for the prosecution that there was no case to meet under s. 173(f) Criminal Procedure Code. The learned Magistrate disagreed and called upon the defence. The accused elected to remain silent, whereupon the Magistrate acquitted him. On appeal by the Public Prosecutor, the order was reversed, and in doing so Cussen J said at page 113:

> ... I would like to state that it is wrong and contrary to the provisions of the Criminal Procedure Code for a Magistrate, if at the close of the prosecution case he in fact considers that only a highly suspicious case has been made out against the accused, to proceed to call upon the defence in the possible hope that the defence, if one is made, may resolve his doubts.
>
> Without examining in detail the evidence given for the prosecution in this case I have no doubt whatever that this was a case which strongly warranted a conviction if unrebutted and that the accused should have been convicted.

In our view, *Lee Yee Heng* laid down the important principle that in order to prove a *prima facie* case, the prosecution evidence must be capable of belief, and only beyond reasonable doubt evidence can constitute credible evidence (see also *Mohd. Yatim's* case and *Mohd. Radhi's* case).

The most quoted decision on the "*prima facie* case" requirement of s. 180 is that of Gordon-Smith Ag. J.A. *Public Prosecutor v. Chin Yoke* [1940] MLJ Rep. 37. In that case the Magistrate acquitted and discharged the respondent without being called upon to enter his defence on two charges under the Road Traffic Enactment 1937. The Public Prosecutor appealed on the ground that the learned Magistrate in coming to the conclusion that a *prima facie* case had not been made out against the respondent, was against the weight of evidence. In allowing the appeal, Gordon-Smith Ag. J.A. had this to say at page 38:

> The second point is as to when a Magistrate is justified in acting under s. 173(f) of the Criminal Procedure Code. This paragraph reads as follows:
>
> > If, upon taking all the evidence hereinbefore referred to (i.e. the evidence for the prosecution) 'the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction, the Court shall record an order of acquittal'.
>
> Similar provision is also made by s. 180, in the case of a trial by a Judge without Assessors, by s. 190 in the case of a trial by a Judge with Assessors and by s. 214 in the case of a trial by jury. There is, however, a distinction to be drawn in respect of the last instance, to which I will refer later. A Magistrate is, therefore, in the same position as a Judge in the exercise of the powers conferred respectively by s. 173(f), 180 and 190, the relevant wording of all three provisions being identical.

One is quite familiar with the course often adopted by Counsel for the defence at the close of the case for the prosecution (particularly in a trial with a jury), when he submits that he has no case to answer, or in other words, that the prosecution has failed to make out a *prima facie* case against the accused and it is submitted that accused should not be called on for his defence.

It is then that it is the duty of the Magistrate or Judge to consider the evidence already led and decide whether or not to call on the accused for his defence, and the question arises what is a *prima facie* case? In *Mozley and Whiteley's Law Dictionary* (5th Ed.) it states:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

This follows very closely the actual wording of the sections referred to but it does not follow, in my opinion, that the Magistrate or Judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction, In such case the accused is then called upon to answer the *prima facie* case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence,

In *Public Prosecutor v. Lim Teong Seng & 2 Others* [1946] 12 MLJ 108, the main issue for determination before Laville J was whether it was correct for the Crown Counsel to submit that if there is any reasonable evidence offered by the prosecution, the Court ought to hear the defence, notwithstanding that there is doubt as to the identity of the accused. At pages 109 to 110 Laville J said:

> However that may be, the real point at issue in this case is whether the 3 accused men were part of the body of Chinese who entered Shariff's house. The only evidence as to their identity is that of Wok binte Talib, who asserts she was attacked and mishandled by them. All of them she says, and there seems no reason to doubt it, were known to her before. But against this identification are the following facts. It was not till some time in December 1945, that is 3 months after the event that she named the 3 accused as guilty parties. She had ample opportunity to take the natural course and state immediately after the assault that 3 of the men concerned were the accused known to her of old; she states that she did not do this because during those 3 months there was fear of the Chinese at Kluang among the Malays there. Even if that was so, the people to whom she went for refuge were Malays, people of her own race, and one of them, a man having some official authority, the ketuah Kampong, and yet to neither of these 2 men, nor to her daughter did she reveal that she knew the 3 men who assaulted her by name; it is clear that on the night of the 23rd and on the 24th, though weak, she was conscious and could and did relate what had occurred and it is my view incredible that in doing so, she did not give the names of the accused who had injured her and her husband severely; it seems to me that as a reasonable man I must hold that the only reason for not doing so, was that she did not then recognise any of the attackers as the accused men she knew. Even if she was afraid of the Chinese I cannot see what she had to fear from confiding the names at once to Kasidan, Ahmad and her daughter, who were of her own race and presumably had as much to fear from the Chinese.
>
> In view of these considerations, I am of the opinion that no case has been made out by the prosecution which if unrebutted would warrant a conviction and, as in duty bound, I must acquit all the accused on the charge.

It is clear that Laville J was dealing with a case where the identity of the accused was in doubt, and as such whatever has been said by the learned Judge about proof beyond reasonable doubt, should be construed in this context. The identity of the accused is obviously an essential ingredient in any criminal charge to establish both the *actus reus* and *mens rea*. The failure to establish the identity of the accused would naturally leave the defence with nothing to answer. Thus, where there is a doubt as to the identity of the accused at the close of case for the prosecution, there can hardly be a *prima facie* case as required by s. 180. In our view, *Lim Teong Seng's* case cannot be construed as a real departure from *Chin Yoke*. On the contrary, it supports the principle that requires beyond reasonable doubt evidence on the essential ingredients of the charge for the purpose of establishing a *prima facie* case under s. 180.

Similarly, in *Public Prosecutor v. R. Balasubramaniam* [1948] 14 MLJ 119 which incidentally made no reference at all in either *Public Prosecutor v. Lee Yee Heng* or *Public Prosecutor v. Chin Yoke*, Callo J wrongly, in our view construed *Public Prosecutor v. Lim Teong Seng* for the proposition that at the close of case for the prosecution, the Court must consider even if a *prima facie* case is shown, whether all element of doubt is sufficiently removed to sustain a conviction if no more evidence is adduced. If the prosecution evidence is insufficient, how could there be a *prima facie* case?

Again, in *Public Prosecutor v. R. Balasubramaniam* [1948] 14 MLJ 119, which heavily relied on *Lim Teong Seng* ought not to be construed as laying down different judicial opinion as to the meaning of a *prima facie* case. What constitutes a *prima facie* case has been judicially defined starting with *Mozley and Whiteley's Law Dictionary* (5th Edition), which was quoted with approval by Gordon Smith, Ag. JA in *Public Prosecutor v. Chin Yoke* [1940] MLJ 38 which states:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

As distinct from *prima facie* case, *Sarkar on Evidence*, at page 45 defines "*prima facie* evidence" as "evidence which, if accepted appears to be sufficient to establish a fact, unless rebutted by acceptable evidence to the contrary. It is not conclusive."

"*Prima facie*", means on the face of it or at first glance. So, "a *prima facie* case" is a "case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive." (See *The Oxford Companion to Law*, page 987). "*prima facie* evidence" is evidence where "a party's evidence in support of any issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence" (see *Cross on Evidence* 2nd Edition, pages 24 & 25, and also per Wee Chong Jim CJ in *Gan Soo Swee & Anor. v. Ramoo* [1969] 1 MLJ 59 at 61). In our view, under s. 180, a *prima facie* case is one which is established by sufficient beyond reasonable doubt evidence and can be overthrown only by rebutting evidence adduced by the other side, so as to cast a reasonable doubt in the prosecution case as to the guilt of the accused.

It is to be observed, that in *Balasubramaniam*, the accused was charged for falsification of Account Book, an offence under s. 477 of the Penal Code. At the close of case for the prosecution, Callow J found an essential ingredient of the charge, namely proof of wilful intent had not been proved, even on *prima facie* basis at the close of case for the prosecution. There was only evidence that the Account Book was incorrect, ill-kept or

misleading, which is clearly not sufficient by itself to prove wilful fraud. The learned Judge held that there must be conscious determination to defraud as distinguished from ignorant incompetency. In the concluding paragraph of his judgment, Callow J said:

> Lack of supervision and check in the Mentakab Hospital has been shown; incompetency and inefficiency by the accused is apparent, but on the evidence before me I cannot be sure whether the accused in 1946 deliberately falsified the book P.5, or simply muddled it. Did he then later try and adjust his figures, and even so failed in arithmetic? Had there been any evidence of *mala fide* dealings with the bedsheets the case would have assumed a different aspect. I am by no means convinced of the innocence of the accused, of which he might have satisfied me had he elected to continue, but I do not find a case by the prosecution which if unrebutted would warrant a conviction, and I am bound in law to acquit the accused of the charge....

It is therefore clear Callow J had applied the crucial words "if unrebutted would warrant his conviction" as a *prima facie* case requirement for the purpose of ss. 173(f) and 180. As there was nothing for the accused to rebut, the prosecution could not be said to have established a *prima facie* case.

In *Wong Yiap Long & Another v. Public Prosecutor* [1955] 21 MLJ 132, the accused was charged under the Betting Ordinance 1953, and although the evidence was incomplete at the end of the prosecution, the Court nevertheless called the accused for the defence. In allowing the appeal, Abbot J had this to say:

> ...The only point for determination is as to whether or not the prosecution had made out a *prima facie* case before the defence was called upon. Before the prosecution closed its case, the senior police officer merely stated that he led the raid acting upon information which had been given to him by some person, orally in the street. Sections 12, 13 and 14 empower the search of premises and the granting of search warrants by Magistrates, Justices of the Peace and Senior Police Officers. Section 14 (1)(d) enables premises to be searched without reducing an informer's information to writing where the object of the search would be defeated by the delay. The senior police officer himself did not testify as to whether or not such delay would have defeated the ends of justice, nor did he give any reason as to why the information had not been reduced to writing. At the close of the prosecution case, therefore, the evidence was incomplete and no *prima facie* case had been made out. The appeal must, therefore, be allowed....

Notwithstanding any differences of opinion on the meaning of *prima facie* case none of the authorities has advocated that s. 180 requires the prosecution to prove a beyond reasonable doubt case. Common to all these cases is the fact that before a *prima facie* case can be said to be established, there must be sufficient evidence to establish every legal ingredient of the charge against the accused, such as his identity and identity of the offensive exhibits. The evidence against the accused on the essential ingredients of the charge must be free from any reasonable doubt. The general burden of proof beyond reasonable doubt on the guilt of the accused is always on the prosecution and it never shifts. But a finding that a *prima facie* case has been made out under s. 173(f) and Section 180 is a particular burden imposed by statute that on the evidence as it stands the accused would lawfully and not ought to be convicted of the offence charged. The question whether he ought to be found guilty and convicted must be postponed until the conclusion of the trial, and it depends upon the Court being satisfied beyond reasonable doubt on the whole evidence before it that the defendant is guilty. In *Public Prosecutor v. Saimin & Others* [1971] 2 MLJ 16 at 17, Sharma J put the matter in this way:

> The burden of proof remains on the prosecution throughout trial. If the learned Magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge

a the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases, with which we are not concerned here.

As the learned Magistrate seems to have ignored the very basic principle of criminal law, it may perhaps serve a useful purpose to remind those administering justice in the lower b courts that evidence discloses a *prima facie* case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused.

In *Saimin's* case it is pertinent to note that the Magistrate's defective reasoning for calling the accused to enter his defence was as follows:

I am making this ruling (on *prima facie* case) not because I am satisfied with the case of the prosecution but because I want the accused to explain for themselves. c

Clearly the reason given by the Magistrate was wrong in law as it had the effect of imposing a burden on the accused to establish his innocence. In any event the evidence before the Magistrate could not possibly constitute a *prima facie* case as required by s. 173(f). To satisfy the statutory requirement there has to be sufficient evidence on the basis of maximum evaluation of the prosecution evidence as tested in cross-examination d on the essential ingredients of the charge preferred against the accused. The *prima facie* case is a statutory requirement which cannot be ignored. If the case required to be established by the prosecution under s. 180 is a "beyond reasonable doubt case", then the words "if unrebutted" and "would warrant his conviction", would become meaningless and redundant. To avoid breaching the principle of interpretation against redundancy of legislative words, the only reasonable interpretation as consistently interpreted by the Courts e in the past is that s. 180 requires "a *prima facie* case" to be established by the prosecution before the accused could be called to enter his defence.

There is clearly a distinction on the duty of the prosecution, at the close of its case under s. 180 Criminal Procedure Code, and at the conclusion of the trial. The statutory burden under s. 180 is for the prosecution to establish a *prima facie* case before the defence is called; whereas the common law burden at the conclusion of a trial for the prosecution f is to prove the guilt of the accused beyond reasonable doubt as contained in the judgment of Spencer Wilkinson J, in the case of *Mah Kok Cheong v. R.* [1953] 19 MLJ 46 at page 47:

But whatever may be the defence to a criminal charge the sole question which a Subordinate Court has to ask itself **at the conclusion of the trial** is - Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? I say g 'the sole question' advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first **proved a case**. In this respect our criminal procedure differs from that in England and this difference makes it necessary to apply with caution the English decisions which almost all deal with trials by jury.

(emphasis supplied)

h What is the nature of the "case" to be proved, referred to by Spencer Wilkinson, J? From a line of authorities already referred to, in particular *PP v. Chin Yoke*, it is clearly a *prima facie* case imposed by s. 180, i.e. a case "which if unrebutted would warrant his conviction." It is different from the sole question to be asked at the conclusion of the trial.

i From the case of *Mah Kok Cheong* and other local authorities, there is clearly no legal requirement for the Court to decide on the guilt of the accused at the close of the

prosecution. Only the test under s. 180 needs to be applied. If the accused elects to remain silent and call no evidence after defence is called, then at the conclusion of the trial, there is a duty on the part of the Court to consider the evidence as a whole as a separate exercise on the guilt of the accused on the beyond reasonable doubt test, i.e. "Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt?"

We are not persuaded by Mr. Karpal Singh's argument that the learned Judicial Commissioner in this appeal has erred in law for failing to comply with the ratio in *Khoo Hi Chiang.* In our view there is no definitive ruling in *Khoo Hi Chiang* that the word "case" in s. 180 is not a *prima facie* case.

Before calling for the appellant to enter his defence, apart from stating that the evidence of prosecution witnesses was credible and there was sufficient evidence to call for the defence, the learned Judicial Commissioner also relied generally on *Haw Tua Tau* and *Ragunathan*. Now, is that a misdirection in law which merits our interference? We do not think so.

Both Counsels before us have correctly referred to page 290 in the judgment of *Khoo Hi Chiang* as suggesting the serious change or alteration in the interpretation of s. 180:

> Consequently, the duty of the Court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible - the *Haw Tua Tau* test - but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

As far as we are able to gather the interpretation of the word "case" referred to in s. 180 only appears in *Khoo Hi Chiang* from pages 285 to 286 as an *obiter dicta* whilst the Court was dealing with the principal issue of maximum evaluation of the evidence. Thus, after dealing with the principal issue at length commencing at page 278, the judgment took a short break at page 285 with the following observation:

> Before proceeding to consider the Privy Council case of *Haw Tua Tau*, we would make the preliminary observation that the expression 'a *prima facie* case' is nowhere to be found in the Code.
>
> Now, what is meant by the expression '*prima facie* case?
>
> That phrase is not self-explanatory and indeed is ambiguous. What is it that the case shows *prima facie* or at first sight?
>
> Nevertheless, the expression '*prima facie* case' has been regularly used by our courts; see, for example, *PP v. Lee Yee Heng* (per Cussen J at p. 118); *Chin Yoke v. PP* (per Gordon Smith Ag. JA at p. 49); *PP v. R. Balasubramaniam* (per Callow J at p. 120); *Wong Yiap Long & Anor. v. PP* (per Abbott J at p. 133) and *PP v. Saimin & Qrs.* (per Sharma J at p. 17). A reading of the judgments in these cases suggests that there is a difference of judicial opinion as to what constitutes a *prima facie* case.
>
> More particularly, in *R. Balasubramaniam*, Callow J drew a sharp distinction between a *prima facie* case and a case beyond reasonable doubt whereas neither Gordon Smith Ag. JA in *Chin Yoke* nor Sharma J in *Saimin* did anything of the sort and, indeed, they both seemed to combine the two concepts. Of the two views, that of Gordon Smith Ag. JA and Sharma J, that of Gordon Smith Ag. JA, with respect seems to us much clearer as his view is that if, after weighing up the evidence for the prosecution, the Court is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called upon for his defence.

After this the Supreme Court dealt with *Haw Tua Tau's* case until the ratio of the judgment was reached at page 290 as quoted earlier on the need of maximum evaluation as opposed to minimal evaluation of the evidence.

As far as it is relevant to this appeal, it seems clear that the only *ratio* in the Supreme Court judgment is on the requirement of maximum evaluation of the evidence at the close of case for the prosecution. We are of the view that, that is the crux of the principle laid down in *Khoo Hi Chiang*. The Supreme Court disagreement with the Privy Council alleged advocacy of the "minimal evaluation" was grounded on the fact that, firstly, Lord Diplock did not appreciate the difference between jury trial in England and Singapore and a trial before a single Judge in this country; secondly, in any event, Lord Diplock was dealing with a criminal trial in Singapore, under the amended Criminal Procedure Code, which has no application in our Court.

Apart from the question of evaluation of the evidence for the purpose of s. 180, we are unable to accept any suggestion by Counsel that *Khoo Hi Chiang* has made any other binding pronouncement which can be said to have replaced the *prima facie* case test imposed by s. 180. As stated earlier on, there is only a passing observation on apparent difference in judicial opinion as to what constitutes a *prima facie* case in s. 180. There is no serious discussion on interpretation of s. 180 as to why the "case" which the prosecution is required to establish must be changed from "a *prima facie* case" to "a beyond reasonable doubt case'. As is normal in any *obiter dicta*, the Supreme Court has deliberately and correctly declined to give any new interpretation to the crucial words "if unrebutted" and the word "would" in both sections of the Code, which have consistently over the years been interpreted by our Courts as no more than a *prima facie* requirement notwithstanding any distinction between jury and non-jury trials.

In our view the difficulty encountered by both Mr. Karpal Singh and Mr. Stanley Augustin in *Khoo Hi Chiang* lies in extracting the ratio from the judgment of the Supreme Court particularly at page 290 which has (inadvertently perhaps) rolled up two distinct and totally separate questions arising in criminal trials in a single sentence. The first part of the sentence on the need for maximum evaluation of the evidence is clearly the ratio of the judgment, whilst the second limb which is founded on the purpose or object of the maximum evaluation has been incorporated as obiter on the basis of mere observation. In any event, in our respectful view at page 290, Edgar Joseph, Jr. SCJ was only dealing with the establishment of the "charge" by the maximum evaluation evidence, and not the establishment of the "case" under s. 180. In our respectful opinion, the Supreme Court would have been more specific if the intention was to alter or ignore the *prima facie* meaning of s. 180 which has long been embedded in our criminal justice system, at least as early as *Public Prosecutor v. Goo Kian* [1939] MLJ 291 when Raja Musa dealt with the subject.

We are therefore of the opinion that the Court below is only bound by the *ratio* of *Khoo Hi Chiang* that at the close of case for the prosecution, the duty of the Court is to carry out a maximum evaluation of the evidence which, according to *Public Prosecutor v. Chin Yoke* [1940] MLJ 47 and followed in *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 at 497-498, necessarily means that the Court must consider the whole evidence of the prosecution as tested in the cross-examination, on the essential ingredients of the charge.

In our opinion, s. 180 of the Criminal Procedure Code is extremely crucial in our adversarial system of criminal justice, as it entitles the accused to an acquittal at the close of the case for the prosecution, instead of at the usual time, which is at the end of the

trial, when both parties have presented their respective cases. The question which the Court must ask itself at the close of the prosecution case, is one of law imposed by the section. Although the general burden of proof that the accused is guilty beyond reasonable doubt is on the prosecution throughout the trial and it never shifts, the requirement of a *prima facie* case imposed by s. 180 at the close of the prosecution cannot be ignored as a matter of statutory requirement. At the end of the trial there is no duty on the defence to convince the Court that he is innocent. All he needs to do to entitle him to an acquittal is to raise or cast a reasonable doubt in the prosecution case based on the whole evidence. He may of course be entitled to an acquittal at the close of case of the prosecution, if there is no *prima facie* case established against him.

The word "would" under s. 180 should not be interpreted in isolation. As stated earlier on, what is important as a matter of interpretation, is to interpret the nature of the case "which if unrebutted would warrant his conviction." In our respectful view, the phrase obviously refers to a *prima facie* case and not a beyond reasonable doubt case. Under our adversarial system of criminal justice, it would be intolerable if the trial Court were required to find the accused actually guilty beyond reasonable doubt twice - once at the close of prosecution case and again at the conclusion of the trial - before there can be a conviction. Further, what chance would the accused have to earn an acquittal at the conclusion of the trial if the Court were obliged to decide at the close of prosecution that he was already guilty of the charge beyond any reasonable doubt?

The word "'would" has been defined in the *Shorter Oxford Dictionary* to mean, "The feeling or expression of a conditional or undecided desire or intention." There is therefore a conditional or undecided element in the phrase "if unrebutted would warrant his conviction". We see no justification in law in the Court replacing the word "would" with "ought" or with any other word not used by the legislature. The word "would" in the phrase "if unrebutted would warrant his conviction" read in the context of s. 180 clearly imports a conditional or undecided element in the conviction of the accused. In short, the Court needs only be satisfied if a *prima facie* case has been established before calling for the accused to enter his defence.

Having said all that, we can hardly see any objection to the interpretation of the word "would" as meaning "could" as distinguished from "ought". If there is any distinction between "would warrant his conviction" and "could warrant his conviction", it is one without a difference. In either case, the *prima facie* requirement of s. 180 is not affected in view of the words "if unrebutted". As such there appears to be no difference, notwithstanding s. 180, between our position and Australia, where on the authority of *May v. O'Sullivan* the question of law to be decided at the close of the case for the prosecution, when a submission of "no case to answer" is made, "is not whether on the evidence as it stands, the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted". Indeed, the learned Deputy Public Prosecutor's submission quoted earlier on supports this test as distinguished from the test at the conclusion of the trial when he stated, "... that the Court has to give maximum consideration to the prosecution evidence to decide whether the evidence adduced thus far is sufficient upon which the accused can be found guilty ..."

In our opinion, the learned Judicial Commissioner had, in accordance with s. 180, correctly applied the *prima facie* case test when he held that he believed the evidence of the prosecution witnesses and that there was sufficient evidence for him to call for the defence. On the proven factual situation of the case, we are also satisfied that he must have carried out the maximum evaluation of the evidence when he concluded that he believed the

testimony of the witnesses called by the prosecution. In the circumstances, we are of the view that the learned Judicial Commissioner did in effect decide that there was a *prima facie* case and as such did not err in law when he called the appellant to enter his defence. On the evidence before him together with the statutory presumptions under the Dangerous Drugs Act, there was clearly a *prima facie* case to answer.

The first two grounds of appeal must therefore fail.

As regards the other grounds of appeal, we must now consider the defence. There is no dispute in this case that apart from the 25.84 grammes of heroin found in the room, the police raiding party recovered other exhibits in the room which relate to counterfeiting of identity cards. In our view the learned Judicial Commissioner was entitled to reject the accused's explanation that of the three keys to the room, two were given to unnamed friends, while his own key was found missing "three hours before the police party came to search his room". In our view the learned Judicial Commissioner was justified to conclude from the evidence that the appellant was indeed in possession of the heroin found in his small room which he was solely occupying at the material time.

At the end of the judgment the learned Judicial Commissioner had this to say:

> The Court found that the accused had failed to rebut the presumptions under ss. 37 (b), 37 (da) and 37 (g) of the Act. The Court was satisfied that the accused had custody and control of the two packages P2 & P3 containing heroin which was found in his room. He had possession of the heroin seized. Since he had possession of more than 15 grams of heroin he is deemed to be a trafficker under the law. The accused had failed to rebut this presumption.
>
> Having considered all evidence adduced by the defence I am satisfied not only that the defence case was not true but the accused had failed to create a reasonable doubt in my mind as to his guilt. (See *Mohd. Radhi v. PP* [1991] 3 MLJ 169).

After carefully perusing the Appeal Record, we are of the view that the learned Judicial Commissioner had fallen short of considering whether the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act had been rebutted on balance of probabilities in the evidence, i.e. whether he was trafficking at the material time or whether he was in fact forging documents. Our task is made easier when Mr. Stanley Augustin conceded before us that the appellant ought to be convicted of possession of the heroin rather than that of trafficking. We agree with the concession made that the learned Judicial Commissioner erred in law in not sufficiently directing his mind as to the reason why in the face of the undisputed evidence the accused had failed to rebut the presumption of trafficking, in accordance with the principle laid down in *Mohamad Radhi bin Yaacob v. Public Prosecutor*.

We would accordingly reduce the conviction from trafficking to one of possession under ss. 12 and 39A Dangerous Drugs Act, and set aside the death sentence. We shall now hear Mr. Karpal Singh and Mr. Augustin on sentence.

From submissions made, we take into account that the appellant has no previous records and has been in custody since the date of his arrest. As the offence of possession of heroin under s. 12 was committed on 21 October 1985, i.e. before the amendment Act A 659/ 1986 which came into force on l January, 1987 in respect of increased penalties provided under s. 39A, we sentence the appellant to fourteen years imprisonment from the date of his arrest and to six strokes of whipping.